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No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GILBERT L. DOZIER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the prohibition in the Hobbs Act, 18 U.S.C. 1951, against extortion "under color of official right" applies to solicitations of political contributions by a public official without proof of force, threats or use of fear.

2. Whether that portion of the Act, if applicable to such conduct, is void for vagueness.

3. Whether a governmental agency under the control of an elected public official constitutes an "enterprise" within the meaning of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion and judgment of the court of appeals (App. A, *infra*, pp. 1a-30a) is reported at 672 F.2d 531 (5th Cir. 1982). A memorandum opinion of the district court, denying petitioner's motion to dismiss Count One of the indictment (App. B, *infra*, pp. 31a-32a), is reported at 493 F. Supp. 554 (M.D. La. 1980). The trial court's order denying motions for a judgment of acquittal and for a new trial (App. D, *infra*, p. 35a) is not reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976). The opinion and judgment of the court of appeals were entered on April 8, 1982, and a timely petition for rehearing and suggestion for rehear-

ing *en banc* were denied by order dated May 13, 1982 (App. C, *infra*, p. 32a). This petition is timely filed within 60 days of that date.

STATUTES INVOLVED

The Hobbs Act, 18 U.S.C. § 1951 (1976), provides in pertinent part as follows:

> **§ 1951.** Interference with commerce by threats or violence
>
> (a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> . . .
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

The portion of the Racketeer Influenced and Corrupt Organizations statute under which the petitioner was charged, 18 U.S.C. § 1962(c) (1976), provides:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The definitional section of the RICO statute, 18 U.S.C. § 1961 (1976), provides in pertinent part as follows:

> As used in this chapter—
>
> . . .
>
> (4) "enterprise" includes any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity; . . .

STATEMENT

A. The Offenses Charged

The petitioner, formerly the elected Commissioner of Agriculture of the State of Louisiana, was convicted on one count under the RICO statute, 18 U.S.C. § 1962(c) (1976), and three counts under the Hobbs Act, 18 U.S.C. § 1951 (1976). The RICO count charged Dozier with conducting the affairs of the Department through a pattern of "racketeering activities," which consisted of solicitations of funds by Mr. Dozier from persons or businesses that were subject in some manner to regulation by the Louisiana Department of Agriculture. The indictment characterized these solicitations as both violations of the Hobbs Act and bribery under state law. In Counts Two through Five, four of the solicitations were charged as separate offenses under the Hobbs Act.

The allegations of the indictment tracked the statutory language, and identified the alleged "victims" and the sums solicited. Contrary to the belief of the court of appeals, however, the indictment did not identify specific

official actions—"quid pro quos"—that Dozier allegedly promised to take or withhold in exchange for money.[1]

B. The Motion To Dismiss The RICO Count

Before trial, the defense moved to dismiss the RICO Count on the ground (now presented in this Petition) that the Louisiana Department of Agriculture, a public agency headed by an elected official, could not be an "enterprise" for purposes of the RICO statute. The trial court denied the motion (p. 31a, *infra*), relying on previous Fifth Circuit rulings on similar contentions.

C. The Evidence At Trial

The trial lasted three weeks. The government's theory was that Dozier attempted to obtain funds from persons who needed assistance or feared unfavorable action from the Department of Agriculture by leading them to believe that he would assist them if they made contributions. The evidence showed that following his election in December 1975, Dozier sought funds to pay his campaign deficit, and began to plan—and to seek political contributions—for an anticipated race for Governor four years later. In 1979, he decided rather to campaign for reelection as Commissioner of Agriculture, but was defeated for reelection and left

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[1] The court of appeals stated that the indictment "was rife with 'specifically identifiable' *quid pro quos*" (p. 12a, n.4 *infra*), and described the "allegations" as including specific promises or threats made by Dozier in connection with attempts to obtain funds (pp. 2a-3a, *infra*). In fact, only one *quid pro quo* was alleged in the entire indictment: a promise to Temple Brown, a dairy owner, that Dozier would make him "the czar of the milk industry" if he raised money for Dozier from dairy owners across the State. This alleged *quid pro quo* was not argued to the jury by the prosecutor, nor was it mentioned by the court of appeals, as the claimed basis for the extortion charge.

office in March 1980. The alleged acts of attempted extortion or bribery occurred on various dates between his initial election and his defeat in the reelection campaign.

The evidence on two of the charges, viewed in the light most favorable to the government, is set out in the opinion of the court of appeals (*infra*, pp. 8a-9a). The government's witnesses on other charges in the indictment also testified to conduct by Dozier from which, with varying degrees of clarity, it could be inferred that they would be helped or hurt depending on their willingness to contribute. Dozier, who testified in his own behalf, denied that he expressly or impliedly tied his requests for contributions to official actions on any of the occasions described in the indictment.

While the evidence was sufficient to support the verdicts, when viewed in the light most favorable to the government, it was not so compelling as to make the jury's decision an easy one. The evidence showed that of the eleven[2] victims of Dozier's alleged extortion, only four raised or contributed any funds to him at all, and of those four, none received the official action they testified that they sought. Of the remaining seven "victims," from whom Dozier allegedly attempted to obtain in excess of $275,000, none contributed any money, yet five did receive the official action they sought. The government's lead witness on the first of the charges described in the opinion of the court of appeals, Loy Weaver, while strongly suggesting in his trial testimony that he believed Dozier was seeking a *quid pro quo* for favorable action on an auction barn charter, admitted that on an earlier occa-

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[2] One predicate offense alleged in the indictment was dismissed on the government's motion prior to trial.

sion he had testified quite differently. Mr. Weaver—a former FBI and DEA agent—had stated to a legislative committee fifteen months before the trial as follows (Tr. 216-217):

> . . . [I]n my opinion, Mr. Dozier did not violate the law. In your opinion, maybe he did, but I don't think he did.
>
> . . . He has every right to solicit campaign contributions and I don't deny that. I think the setting was wrong. I think the technique was wrong but that is a political consideration and not a question of criminal prosecution in my judgment. . . . Mr. Cain, you know there is a very very thin line between what is legitimate solicitation of contributions and what is a veiled threat. Anytime you go to your enemy and ask for a contribution, you could call that a threat.

Another witness, Floyd Volentine, while stating on direct examination (over objection) that he considered Dozier's requests for political contributions from groups of auction barn owners to have been "blackmail" and "morally wrong," described on cross-examination what Dozier actually said, as follows (Tr. 892):

> Mr. Dozier stated he was heavily in debt as a result of his campaign for Commissioner; that he wanted $30,000 out of the auction market people, that would come to about $1000 apiece; he was going to make us the best Commissioner of Agriculture that this state has ever had; he was going to be able to help us; he was going to be able to help us; he was going to put the State—the private veterinarians back in the market place, and that he was going to get the fee raised that was paid the auction markets for assisting in testing the brucellosis.
>
> That's the only pitch, Mr. Gravel, he made. . . .

The trial court's instructions on the Hobbs Act, which applied to the predicate offenses under RICO and the

substantive Hobbs Act counts, permitted the jury to find a violation on either of two alternative theories: extortion (1) through the "use of actual or threatened force, violence, or fear" or (2) "under color of official right."[3] It described the latter as "the wrongful taking by a public officer of money or property not due him or his office, whether or not the taking was accomplished by force, threats, or use of fear," and defined the term "wrongful" to mean "the obtaining of property unfairly and unjustly by one having no lawful claim thereto." Tr. 3274. Nowhere did the court's instructions suggest that a conviction could be based only on a showing that Mr. Dozier had solicited funds in exchange for specified official actions—*i.e.*, a *quid pro quo*.

The jury returned guilty verdicts on the RICO count and three of the four Hobbs Act counts, and a not guilty verdict on the remaining count. The defense filed a post-trial motion for a judgment of acquittal on the grounds (now the subject of this Petition) that the Hobbs Act does not apply to non-coercive solicitations as a matter of statutory construction and that, as construed in binding Fifth Circuit precedent and as described to the jury, it is unconstitutionally vague as applied to solicitations of political contributions. The trial court denied the motion without opinion.

D. The Decision Of The Court Of Appeals

On appeal, the petitioner explicitly raised the point that the Hobbs Act's proscription of extortion "under

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[3] Accordingly, the legal sufficiency of each of these theories is before the Court. Where it cannot be known which of two theories a jury chose, a defect in either requires reversal. *See Leary* v. *United States*, 395 U.S. 6, 31-32 (1969); *United States* v. *Rodriguez*, 465 F.2d 5, 10 (2d Cir. 1972).

color of official right" does not apply to attempts to obtain funds without proof of force, threats, or use of fear, but did not further argue the point in deference to the prior rejection of that contention by a panel of the Fifth Circuit in *United States* v. *Williams*, 621 F.2d 123 (5th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981).[4] Likewise, the petitioner explicitly raised but did not argue at length the point that a governmental entity is not an "enterprise" for the purpose of the RICO statute, in deference to the rejection of that argument by a panel of the Fifth Circuit in *United States* v. *Brown*, 555 F.2d 407, 416 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978). The petitioner urged the full court to consider both contentions in a petition for rehearing *en banc*, which was denied without opinion.

The opinion of the court of appeals did address the petitioner's contention that the Hobbs Act, insofar as it punishes attempts to obtain funds "under color of official right," is void for vagueness as applied to the solicitation of political contributions. The Court declined to decide the constitutional sufficiency of previous interpretations by the Fifth and other Circuits of the standards necessary for conviction under the Act, which had defined the offense to include two elements: (1) that the public official sought or obtained funds "knowing he was not entitled to them in the discharge of his lawful duties," and (2) that the payments were "induced by his official position," *United States* v. *Williams*, *supra*, 621 F.2d at 126, or that "the motivation for the payment focuse[d] on the reci-

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[4] The Fifth Circuit follows "the absolute rule that a prior decision of the circuit (panel or en banc) could not be overruled by a panel but only by the court sitting en banc." *Bonner* v. *City of Prichard, Alabama*, 661 F.2d 1206, 1209 (11th Cir. 1981).

pient's office," *United States* v. *Trotta*, 525 F.2d 1096, 1100 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976). Rather, the court of appeals upheld the validity of the Act on the basis that it prohibits a public official from "conditioning performance of official acts on the payment of fees in the name of contributions." P. 10a, *infra*.[5] Relying on the erroneous impression that the indictment charged "'specifically identifiable' *quid pro quos*" offered by Mr. Dozier in exchange for funds,[6] and finding the evidence sufficient to establish that Dozier "demanded specific amounts of money for specific favors," p. 12a *infra*, the court found that his conduct fell "within the 'hard core' of the statute's proscriptions." *Id.* (quoting from *Broadrick* v. *Oklahoma*, 413 U.S. 601, 608 (1973)). It therefore held that he was not in a position to complain of the vagueness of the Act as applied to political fund-raising activities "on the margin of the law." *Id.*

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[5] At other points in the opinion, the Court expressed the test in only slightly different terms. "Whether described familiarly as a payoff or with the Latinate precision of *quid pro quo*, the prohibited exchange is the same: a public official may not demand payment as inducement for the promise to perform (or not to perform) an official act." p. 7a, *infra*. "[A]ny public officer, elected or otherwise, who makes performance (or nonperformance) of an official act contingent upon payment of a fee—whether or not the fee actually is paid or the act actually performed—is guilty of extortion 'under color of official right.'" pp. 13a-14a, *infra*.

[6] See note 1, p. 4 *supra*.

REASONS FOR GRANTING THE WRIT

A. The Court Of Appeal's Ruling That The Hobbs Act Is Applicable In The Absence Of Coercion Extends The Statute Beyond Its Intended Limit

The decision below is the latest of a recent series of cases in which the courts of appeals have held that a public official may be convicted of extortion "under color of official right" without any proof of "threat, fear, or duress," beginning with *United States* v. *Kenny*, 462 F.2d 1205 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972). Prior to *Kenny*, the courts uniformly required a showing of coercion for a conviction under the Hobbs Act. For example, in *United States* v. *Hyde*, 448 F.2d 815, 833 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972), the Fifth Circuit distinguished extortion under the Hobbs Act from the offense of bribery in which the victims were "willing participants":

> The distinction [of extortion] from bribery is therefore the initiative and purpose on the part of the official and the fear and lack of voluntariness on the part of the victim.

See United States v. *Addonizio*, 451 F.2d 49, 72 (3d Cir.), *cert. denied*, 405 U.S. 936 (1972); *United States* v. *Kubacki*, 237 F. Supp. 638, 641-42 (E.D. Pa. 1965).

Without substantial discussion and without acknowledging the novelty of its holding, the court in *Kenny* repudiated the well-established distinction between extortion and bribery and held, for the first time, that extortion "under color of official right" does "not require proof of threat, fear, or duress." 462 F.2d at 1229. A number of cases have followed *Kenny* without substantial independent consideration of the issue that the Third

Circuit resolved so peremptorily.[7] Thus, the Hobbs Act has been extended to any case in which a defendant has "accepted . . . money and gratuities, knowing he was not entitled to them in the discharge of his lawful duties, and that payment was induced by his official position," *United States* v. *Williams*, 621 F.2d 123, 126 (5th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981), with only cursory attention to whether this construction is valid.

Putting aside for the moment the difficulty of applying this test to political fund-raising activities, which was acknowledged by the court below, these holdings have divorced the Hobbs Act's proscriptions from their focus on coercion and have made of the Act a vehicle for the prosecution of conduct not contemplated by Congress to fall within its reach. Both the error of the *Kenny* rule and its "revolutionary" implications for federal prosecutions of public officials were carefully reviewed by Judge Aldisert in *United States* v. *Cerilli*, 603 F.2d 415, 426-27

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[7] *United States* v. *Hathaway*, 534 F.2d 386, 393 (1st Cir.), *cert. denied*, 429 U.S. 819 (1976); *United States* v. *Trotta*, 525 F.2d 1096, 1100 n.7 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); *United States* v. *Harding*, 563 F.2d 299 (6th Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978); *United States* v. *Staszcuk*, 502 F.2d 875, 878 n.5 (7th Cir. 1974), *modified in other respects*, 517 F.2d 53 *(en banc)*, *cert. denied*, 423 U.S. 837 (1975); *United States* v. *Brown*, 540 F.2d 364, 371-72 (8th Cir. 1976); *United States* v. *Braasch*, 505 F.2d 139, 151 n.7 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States* v. *Hall*, 536 F.2d 313, 321 (10th Cir.), *cert. denied*, 429 U.S. 919 (1976). Only *Harding* engaged in any independent consideration of the issues, and the Eighth Circuit there characterized its analysis as "a few additional words of explanation" for its agreement with "other courts which have considered the issue." 563 F.2d at 302.

(3d Cir. 1979) (dissenting opinion), *cert. denied*, 444 U.S. 1043 (1980), who summarized his conclusion as follows:

> It is now my view that our interpretation in *Kenny* and its progeny is not supported by the legislative intent underlying the Hobbs Act nor is it historically accurate. I believe that our failure to reexamine its rationale has resulted in a perpetuation of erroneous law not only in this circuit but in the First, Second, Fourth, Seventh, Eighth and Tenth Circuits which have followed our lead without setting forth a reasoned elaboration for their conclusions.

When a panel of the Fifth Circuit first adopted the *Kenny* rule, Judge Tate wrote separately to state "for benefit of en banc consideration or further review," that it was "clear" to him "that the congressional intent to punish racketeering by extortion, with penalties of up to twenty years imprisonment, included that the extortion be by coercion, economic or otherwise." *United States* v. *Williams*, *supra*, 621 F.2d at 126. Indeed, even Judge Gibbons, who wrote the opinion in *Kenny*, has written in dissent to criticize the extension of the Hobbs Act to certain forms of non-coercive conduct now encompassed within the interpretation applied by the courts of appeals. *See United States* v. *Mazzei*, 521 F.2d 639, 646-56 (3d Cir. 1975) *(en banc)*, *cert. denied*, 423 U.S. 1014 (1975) (Gibbons, J., dissenting). And a former United States Attorney and head of the Watergate Special Prosecution Force, after reviewing the uses to which the Hobbs Act has recently been put, has written:

> Given this flurry of prosecutorial activity, it is appropriate to consider whether the original theory of the *Kenny* prosecution is supportable either as a matter of legislative intent or as a matter of historical accuracy. If substantial uncertainty exists on both these counts, it must then be asked whether courts should continue to accept the broad interpretation of

> the Hobbs Act espoused by the Government, given the vast potential for federal intrusion into state and local law enforcement that such an interpretation entails.

Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 Geo.L.J. 1171, 1178-79 (1977).

B. The Hobbs Act Standard For Extortion Under Color Of Official Right, Under Which Petitioner Was Tried And Convicted, Is Unconstitutionally Vague.

For the reasons stated above, this Court should grant certiorari to decide whether extortion "under color of official right" under the Hobbs Act applies without proof of threats, force, or duress. Even if the *Kenny* rule is a proper construction of the Act, however, the effort of the court below to save that construction from the vice of vagueness as applied to the solicitation of political contributions represents both an unsettling departure from prior law and an unlawful affirmance of the petitioner's conviction on a legal theory upon which he was not tried.

Prior to the decision of the Fifth Circuit in this case, the prevailing requirement for conviction of extortion "under color of official right" was that the defendant sought or accepted funds "knowing he was not entitled to them in the discharge of his lawful duties, and that payment was induced by his official position." *United States* v. *Williams*, *supra*, 621 F.2d at 126. Other courts had set forth the standard in similar terms: "So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951." *United States* v. *Trotta*, 525 F.2d 1096, 1100 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); *United States* v. *Braasch*, 505 F.2d 139, 151 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

Ordinarily, a public official has no business accepting money to which he is not "lawfully entitled" by reason of contract, honorarium or the like, and where he does so, he has reason to know that he is in danger of criminal prosecution. The further requirement in such a case that the payment be "induced by his official position" is one that—while far from precise—may afford a sufficient standard to meet the notice requirement of a criminal statute. But where the solicitation or payment in question is a political contribution, the formulation breaks down entirely, for a public official is *never* "lawfully entitled" to a political contribution, yet he *must* solicit and receive them if he is to campaign for election or reelection.

That fact leaves such an official, under the prevailing interpretation of the Hobbs Act, with a single standard to define the difference between a criminal offense carrying a 20-year prison sentence, and a lawful receipt of a political contribution: whether the contribution is "induced" or "motivated" by his office. It does not require extended discussion to demonstrate the precarious position such a vague standard creates for candidates who know that large contributors to their campaigns hope for and expect a sympathetic ear for the needs and the views of their industry, trade union, profession, or other special interest. As the District of Columbia Circuit observed in reversing a conviction for failure adequately to instruct the jury on the difference between bribery, unlawful gratuity, and innocent receipt of funds, "No politician who knows the identity and business interests of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation." *United States* v. *Brewster*, 506 F.2d 62, 81 (D.C. Cir. 1974).

In short, the interpretation of the Hobbs Act under which the petitioner was indicted and tried is so vague when applied to solicitations of political contributions that people "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926).

Furthermore, the demand for specificity in this context is particularly urgent because the activity in question is protected by the First Amendment. This Court recognized in *Buckley* v. *Valeo*, 424 U.S. 1, 19, 21 (1976), that "virtually every means of communicating ideas in today's mass society requires the expenditure of money" and thus that fund-raising is "necessary for effective advocacy." When a statute is capable of reaching first-amendment activity, this Court has "demand[ed] a greater degree of specificity than in other contexts." *E.g.*, *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974); *Parker* v. *Levy*, 417 U.S. 733 (1974). "Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone.' " *Grayned* v. *City of Rockford*, 408 U.S. 104, 109 (1972).[8]

In response to the petitioner's challenge to the constitutionality of the Hobbs Act as applied to solicitations

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[8] Apart from its tendency to chill a necessary element of modern first-amendment activity, the prevailing interpretation of the Hobbs Act creates an unacceptable risk of selective and arbitrary enforcement. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 109 (citing many cases). This risk is particularly severe and intolerable in the area of political activity. This Court's review is appropriate to assure that controversial or unpopular candidates are not singled out by prosecutors or convicted by juries guided by standards as vague as those now embodied in the Hobbs Act.

of political contributions, and recognizing the validity of these concerns, the court below expressly disavowed that the formulation it had earlier announced in *United States* v. *Williams*, *supra*, was intended as "a well-chiseled standard in that context," *infra*, p. 6a n. 1. It also declined to accept the Second Circuit's formulation of extortion "under color of official right" set forth in *United States* v. *Trotta*, *supra*. Rather, it adopted a totally new standard to define the offense of extortion "under color of official right," as follows: "[A] public official may not demand payment as inducement for the promise to perform (or not to perform) an official act." *Infra*, p. 7a.[9]

By interpreting the statute, when applied in the context of political contributions, as a prohibition against the demand for or receipt of money in exchange for the promise or performance of an official act, the court below has made the Hobbs Act a bribery statute applicable to all state and local public officials whenever their duties impact on interstate commerce. That Congress never intended the Hobbs Act as such a criminal statute is evidenced not only by the legislative history and previous interpretations of the Act, but by other Congressional action. When Congress set out to prohibit the solicitation of political contributions as a condition to the performance or nonperformance of an official act by a state or local official, it did so in plain language—and made the offense

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[9] The court did not say whether this standard—requiring proof of a *quid pro quo*—is to be applied only in the context of political contributions or is to be applied generally under the "under color of official right" portion of the Hobbs Act.

punishable as a misdemeanor, rather than by 20 years imprisonment as provided in the Hobbs Act. [10]

Furthermore, even if the court of appeals' construction of the statute were consistent with the language and history of the Act and sufficient to save it from the vice of vagueness, it could not be retrospectively applied in this case. This Court has recognized that an appellate court may not reject a vagueness challenge on the basis of a narrowing construction that was not available to the trier of fact. *E.g.*, *Shuttlesworth* v. *Birmingham*, 382 U.S. 87, 92 (1965); *Gregory* v. *Chicago*, 394 U.S. 111, 118-24 (1969) (Black, J., concurring). *See Cole* v. *Arkansas*, 333 U.S. 196 (1948); *Stromberg* v. *California*, 283 U.S. 359 (1931); *Dunn* v. *United States*, 442 U.S. 100 (1979). When a jury has not had an opportunity to apply a limiting construction, the appellate court is "unable to say" that the conviction did not rest on "an unconstitutional construction" of the statute. *Shuttlesworth* v. *City of Birmingham*, *supra*, 382 U.S. at 92. Thus, an affirmance violates the defendant's right to have a jury apply proper standards to

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[10] Section 601 of Title 18, United States Code, provides as follows:

> Whoever, directly or indirectly, knowingly causes or attempts to cause any person to make a contribution of a thing of value (including services) for the benefit of any candidate or any political party, by means of the denial or deprivation, or the threat of the denial or deprivation, of
>
> (1)any employment, position, or work in or for any agency or other entity of the Government of the United States, a State, or a political subdivision of a State, or any compensation or benefit of such employment, position, or work; or
>
> (2)any payment or benefit of a program of the United States, a State, or a political subdivision of a State;
>
> if such employment, position, work, compensation, payment or benefit is provided for or made possible in whole or in part by an Act of Congress, shall be fined not more than $10,000, or imprisoned not more than one year, or both.

his case. In this case, the record confirms that Mr. Dozier was not tried on the theory on which his conviction was affirmed.

a. The indictment was phrased in the language of the statute and thus did not suggest that a "*quid pro quo*" was required for a conviction.

b. The operative jury instruction on the Hobbs Act did not require a *quid pro quo*, but rather only a "wrongful taking . . . whether or not the taking was accomplished by force, threats, or use of fear."[11] "Wrongful" was defined to mean "the obtaining of property unfairly and unjustly by one having no lawful claim thereto."

c. Under the Louisiana Bribery Statute, the prosecutor argued for a conviction without any showing of a *quid*

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[11] The instructions delivered at trial regarding extortion "under color of official right" included the following (Tr. 3274):

> Extortion under the color of official right is the wrongful taking by a public officer of money or property not due him or his office, whether or not the taking was accomplished by force, threats, or use of fear. In other words, the wrongful use of otherwise valid official power may convert dutiful actions into extortion. So, if a public official threatens to take or withhold official action for the wrongful purpose of inducing a victim to part with property, such a threat would constitute extortion, even though the official was already duty bound to take or withhold the action in question.

The government has relied heavily in its prior filings on the last two sentences of this instruction, to which the defendant did not object. However, it is clear that these sentences are designed only to address a defense sometimes offered to justify otherwise "wrongful takings," a claim that an official's action was one which he was duty-bound to take even if improperly motivated. *See, e.g., United States* v. *Hyde*, 448 F.2d 815, 832-33 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972). They did not limit the category of actions punishable under the first, definitional sentence.

pro quo, confirming that the government's view was that political contributions could be punished on terms different than those later announced by the Fifth Circuit (Tr. 3029):

> [I]t is not necessary that bribery solicited be for a specific act, or what we may call a quid-pro-quo. It's only necessary that it be solicited--with the various things, of course, specific intent and other law that the court will read to you that require that it be solicited with the intent to influence him in the conduct of his office, not for a specific thing, but general. [12]

To be sure, the prosecutor attempted at trial to prove that Mr. Dozier's solicitations did involve *quid pro quos*. However, the jury was never instructed to resolve that question to determine the petitioner's guilt or innocence. A conviction on a theory not presented to a jury cannot be upheld solely because there is "no glaring distinction between the Government's theory at trial and the [court of appeals'] analysis on appeal." *Dunn* v. *United States*, *supra*, 442 U.S. at 107. The constitutionality of the vague construction of the Hobbs Act under which Mr. Dozier was convicted is squarely presented for review.

C. A Governmental Agency Headed By An Elected Official Is Not An "Enterprise" Within The Meaning Of 18 U.S.C. § 1961

Whether a governmental agency under the control of an elected public official may be deemed an "enterprise"

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[12] The prosecutor was arguing from the following jury instruction concerning the Louisiana Bribery Statute (Tr. 3244-45):

> The inquiry . . . is whether the political contribution is made or solicited *not as [a] quid pro quo for specific action*, but with the intent to influence the conduct of the public servant in relation to his position, employment or duty. (Emphasis added).

within the meaning of the federal racketeering statute is an important question regarding the construction of a significant federal criminal statute that this Court has not yet resolved.[13] As this case amply demonstrates, the Department of Justice persistently prosecutes alleged offenses by individual public officials under the theory that all public agencies are enterprises. *See* Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 Fordham L. Rev. 165, 205 (1980). The holding of the court below that such a use of the RICO statute is proper is squarely contrary to the statutory language and history, as reviewed and explained by a panel of the Sixth Circuit in a decision now under reconsideration *en banc*. *United States* v. *Thompson*, ____ F.2d ____ (6th Cir. Feb. 8, 1982), petition for rehearing *en banc* granted March 26, 1982.[14] The significance of the issue fully justifies the

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[13] Whether public corporations or boards that amount merely to state-operated commercial ventures engaged in interstate commerce qualify as "enterprises" under the statute is not in question here. *See United States* v. *Frumento*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied sub nom., Millhouse* v. *United States*, 434 U.S. 1072 (1978); *United States* v. *Barber*, 476 F. Supp. 182 (S.D. W.Va.), *aff'd mem. sub nom. Vignola* v. *United States*, 605 F.2d 1199 (3d Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980). These entities do not perform "traditional governmental functions," *National League of Cities* v. *Usery*, 426 U.S. 833, 852 (1976), but rather share a common goal—profit maximization—with private business enterprises. *See* J. Nowak, R. Rotunda & J. Young, *Constitutional Law*, 370 (1978) (distinguishing "essentially governmental" state functions, which are not subject to federal taxation, from those that are "proprietary (business) in nature and properly taxed"); *Ohio* v. *Helvering*, 292 U.S. 360 (1934).

[14] The *Thompson* case, which involved the Office of the Governor of the State of Tennessee as the alleged "enterprise," was reargued *en banc* on April 26, 1982, and no decision has yet been issued.

Department of Justice's conclusion in its petition for rehearing in *Thompson*, as follows:

> The importance of the issue in this case is hard to overstate. . . . We believe that the issue presented in this case [is] equal in importance to the question of whether the racketeering statute reaches illegitimate as well as legitimate enterprises, a question which . . . was ultimately resolved by the Supreme Court.

As this Court recently confirmed, *United States* v. *Turkette*, 452 U.S. 576 (1981), the statutory definition of "enterprise" is, on its face, broad and unambiguous. Close scrutiny of 18 U.S.C. § 1961(4) (1976) reveals, however, that it is unambiguous only with respect to the *form* that an enterprise may take; the definition does not address the *purpose* for which an enterprise exists. Business, both legal and illegal, may be conducted in many forms, and it was Congress' clear intention that RICO would cover all of these forms. But the word "enterprise" implies an economic, profit-seeking orientation that did not escape Congress' attention. In fact, the legislative history "is replete with examples of legislators' use of the word 'business' synonymously with the statutory concept of 'enterprise.' " Note, *The Racketeer Influenced and Corrupt Organizations Act: An Analysis of the Confusion in its Application and a Proposal for Reform*, 33 Vand. L. Rev. 441, 474 (1980). Congress could not have meant, for example, that every individual *is* an enterprise, but only that every individual, like every legal or nonlegal entity, *can be* an enterprise if he pursues certain economic goals. Because most state agencies do not pursue the goals that characterize "enterprises" as Congress understood that term, they do not fall within the statutory definition. This argument has not been addressed by any of the courts of appeals.

Other internal evidence of RICO's scope confirms this interpretation of "enterprise." Sections 1962(a) and 1962(b) clearly contemplate that an enterprise is something in which one can invest and hold a property interest, and applying RICO's civil remedies to state agencies would yield anomalous results. Section 1964(a) authorizes district courts not only to prohibit "any person from engaging in the *same type of endeavor* as the enterprise engaged in," but also to order "dissolution or reorganization of *any* enterprise." 18 U.S.C. § 1964(a) (1976) (emphasis added). It is inconceivable that Congress would or could have sanctioned the use of such sweeping remedial power against state agencies that undertake only traditional governmental functions. The "primacy" of RICO's remedial provisions and their "total inapplicability . . . to governmental entities corroborate what the legislative history demonstrates: Congress had no intention of including governmental units within the ambit of the 'enterprise' provisions . . . ." *United States* v. *Grzywacz*, 603 F.2d 682, 691 (7th Cir. 1979) (Swygert, J., dissenting), *cert. denied*, 446 U.S. 935 (1980). [15]

The importance of the issue and its implications for use of the draconian RICO statute in federal prosecutions of state and local officials are apparent. Given the split of

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[15] Contrary to the conclusion of one court, *United States* v. *Sisk*, 476 F. Supp. 1061, 1062 (M.D. Tenn. 1979), the enumeration of bribery and extortion as "racketeering activities" in 18 U.S. § 1961(1) provides no evidence that a governmental entity may constitute an "enterprise." That an agency performing traditional governmental functions is not a RICO enterprise does not mean that the Act "cannot be used to reach corruption of government by organized outside forces . . . [or] that public officials are immune from RICO actions. . . . Following *Turkette*, the corrupting organizations may

opinion on the issue among judges of the courts of appeals (including one panel holding, now under *en banc* review, that squarely conflicts with the decision of the court below), the issue plainly warrants review by this Court.

CONCLUSION

For the reasons set forth herein, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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themselves be charged as RICO enterprises, and the evils Congress feared and legislated against can be fought." *United States* v. *Thompson*, *supra* (slip op. at 11). If the government can demonstrate a proper RICO enterprise, bribery and extortion are chargeable offenses, but this does not suggest that the inclusion of those offenses was intended to alter the commonly accepted link between "enterprise" and the business of making money.